No. 14-577

In The Supreme Court of the United States

CARPENTER CO., ET AL.,

Petitioners,

v.

ACE FOAM, INC., ET AL., individually and on behalf of all others similarly situated,

and

GREG BEASTROM, ET AL., individually and on behalf of all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT INDIRECT PURCHASER CLASS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. In a situation where there is no split in the circuits, and Petitioners have waived the issue, should this Court grant interlocutory review of a carefully considered, detailed decision of the district court granting class certification, and of an unpublished order of the Sixth Circuit Court of Appeals exercising its "unfettered discretion" under Fed. R. Civ. P. 23(f) denying leave to file an interlocutory appeal, where Petitioners argue, in contravention of this Court's decision in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013), that the district court, as a prerequisite to certifying a class action under Fed. R. Civ. P. 23(b)(3), should have made an evidentiary determination, on an individual basis, that each and every absent and unknown class member had proven a valid and compensable claim against Petitioners?

2. In a situation where the district court followed this Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and the circuits have followed it also, should this Court grant interlocutory review of a carefully considered, detailed decision of the district court granting class certification, and of an unpublished order of the Sixth Circuit Court of Appeals exercising its "unfettered discretion" under Fed. R. Civ. P. 23(f) denying leave to file an interlocutory appeal, where common issues of the existence of Petitioners' price-fixing conspiracy which increased

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

prices to Class Members predominate, and Respondents have proven they have class-wide methodologies for proving liability, injury, and damages at trial, because Petitioners dispute the factual findings supporting predominance?

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent Indirect Purchaser Class is a class consisting of

> [a]ll persons or entities in Alabama, Arizona, California, Colorado, [the] District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Tennessee, Vermont, West Virginia, and Wisconsin who purchased products containing flexible polyurethane foam ["product" here defined to include only carpet underlay, bedding, and upholstered furniture products], not for resale, which were manufactured, produced or supplied by Defendants or their unnamed coconspirators from January 1, 1999 to the present.

Pet. App. 18a-19a. The plaintiff class representatives of the Indirect Purchaser Class are Greg Beastrom, Seth Brown, Susan Gomez, Joseph Jasinski, Henry Johs, Joseph Lord, Kristen Luenz, Gerald & Kathleen Nolan, Kory Pentland, Jonathan Rizzo, Michael Schwartz, Larry Scott, Catherine Wilkinson, Jeffrey S. Williams, Driftwood Hospitality Management ("DHM"), and The Parker Company. DHM is the only class representative with a parent company. DHM's parent is privately owned Driftwood Hospitality Management II, LLC. No publicly-held company owns 10% or more of the stock in any class representative.

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STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals exercised its "unfettered discretion" when it denied Petitioners' Rule 23(f) petition after the district court granted class certification of the Respondent Indirect Purchaser Class. Now, Petitioners seek from this Court an unprecedented writ of certiorari from that denial of interlocutory review.[1]

Even if the Petition were not interlocutory, it fails to raise a dispute worthy of certiorari review. This Court has long recognized that antitrust cases challenging price-fixing conspiracies, such as this one, are particularly well-suited to class certification. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Any trial of this matter will be dominated by an abundance of evidence establishing the existence and scope of the Petitioners' conspiracy to fix the prices of polyurethane foam. This overwhelming evidence of conspiracy, examined in detail by the district court, Pet. App. 23a, 41a-45a, 120a,[2] and which the Petitioners' continue to contest, provides the "glue" holding this case together and furnishes

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[1] The Petition challenges the certification of two separate classes in two separate cases, one case being brought on behalf of a class of Direct Purchasers, and the other being brought on behalf of a class of Indirect Purchasers. The instant response is presented solely on behalf of the Indirect Purchaser Class.

[2] Citations in the form "Pet. App. ___a" are to the Petition's Appendix, while citations in the form "23(f) App. A___" are to the sealed appendix filed with the court of appeals on consideration of Petitioners' Rule 23(f) petition.

important bases for the commonality and predominance findings by the district court. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011), Pet. App. 47a-48a.

In the courts below, Respondent Indirect Purchaser Class demonstrated common methodologies for proving liability through the testimonial and documentary evidence of the conspiracy and its effects on the prices of flexible polyurethane foam, including the extensive evidence of clandestine meetings and communications in support of the conspiracy detailed by the district court Pet. App. 41a-45a, 120a, as well as testimony from Respondent's economic expert, Russell Lamb, Ph.D.

The flexible polyurethane foam which was the subject of Petitioners' long-running conspiracy is a commodity product. Pet. App. 53a-54a, 122a-24a, 127a, 139a, 144a. Petitioners understood the static relationships in the pricing structure of the polyurethane foam products they produced and sold. Pet. App. 54a, 128a. This structure is reflected in Petitioners' price increase announcements, which declared that Petitioners would seek a single price increase across all products. Pet. App. 55a-57a. Respondent Indirect Purchaser Class contends that the conspiracy resulted in inflated prices for flexible polyurethane foam products throughout the class period, and that price increase announcements were but one method used to raise or maintain prices at *supra*-competitive levels. Pet. App. 145a-46a.

Respondent Indirect Purchaser Class also demonstrated common methodologies for showing injury. Petitioners' claim that there are vast numbers of uninjured class members is wrong. Respondent Indirect Purchaser Class' expert, Russell Lamb, Ph.D., demonstrated that Petitioners' conspiracy inflated polyurethane foam prices to *supra*-competitive levels. Pet. App. 143a-46a. Dr. Lamb further demonstrated that these *supra*-competitive prices were paid by the Indirect Purchaser Class, with all or nearly all members of it paying higher prices and being injured.[3] Pet. App. 127a. While Petitioners claim that a certain mattress manufacturer (based on testimony of a witness who lacked direct knowledge) and other direct purchasers did not pass on increased foam costs to consumers, Form 10K filings for that mattress manufacturer, and evidence from the other direct purchasers, demonstrated that these costs were routinely passed on. Pet. App. 126a-27a, 148a-49a. The district court carefully considered a *Daubert* motion directed at Dr. Lamb's testimony, and rejected it, before ruling on class certification. 23(f) App. A6883-94.

Neither of Petitioners' Questions Presented are worthy of certiorari review.[4] Both concern fact-bound

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[3] Petitioners' suggestion that two of the class members lack injury because they purchased products and were reimbursed by others, Pet. at 10, ignores critical evidence that those claims were either assigned to them or that they were contractually obligated to sue as agents, thus giving them standing. Pet. App. 32a-33a.

[4] Amicus DRI – The Voice of the Defense Bar does not address either of the questions presented by Petitioners, but instead advocates for changes in Rule 23(f) procedure which are not

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determinations made by the courts below which fail to raise palpable splits of authority between the circuits or with this Court.

Petitioners waived their Article III argument because they urged the district court to adopt the standard for absent class member injury which they now challenge. 23(f) App. A510-11 and n. 1; A4380.[5] Having asked the court to require Plaintiffs to prove that they could show at trial that all or nearly all of the class members were injured as a precondition for class certification, Petitioners cannot now argue that the district court erred in accepting and applying their standard.

The remainder of this argument, when applied to the facts of the case, boils down to a fact-bound dispute of whether the district court correctly applied Petitioners' chosen standard. Resolution of that issue would require this Court to delve deeply into the disputed facts between the two experts going to the ultimate merits of the case to determine if the linchpin of Petitioners' argument – a claim that "vast numbers" of class members are uninjured – is true, or whether Respondents are correct that all or nearly all class

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raised by the proceedings below and which would require rewriting the rule.

[5] As Petitioners argued, "IPPs must show that *all or nearly all* of the putative IPP class members were 'impacted.'" 23(f) App. A511 (emphasis added). "To certify a class, Plaintiffs must be able to demonstrate that *all or nearly all* of the putative class members were commonly impacted by an antitrust violation." 23(f) App. A4380 (emphasis added); *see also* A6594, A6659.

members were injured. *See* Pet. App. 125a-55a. It is undisputed that a court cannot resolve the ultimate question of whether a defendant is liable for injuring an absent class member at the class certification stage. *Amgen v. Connecticut Retirement Plans and Trust Funds,* 133 S. Ct. 1184, 1210 (2013). Only if this merits dispute were resolved in Petitioners' favor, and the number of allegedly uninjured class members quantified, does Petitioners' Article III argument become relevant.

There is no conflict between the circuits regarding Article III standing of absent class members. The circuits agree that class definitions should be tailored using objective criteria to avoid including uninjured persons. However, no circuit has required, in contravention of *Amgen*, that each absent class member prove his or her entitlement to relief as a prerequisite to class certification under Rule 23(b)(3). While Petitioners have used sound bites from dicta to attempt to conjure a split in the circuits, once the surface of the opinions is scratched, the supposed split goes up in smoke. All of Petitioners' cases hold that a properly defined class should not include absent class members who could not have been injured.

Petitioners' second question presented – that individual damages issues would predominate in supposed violation of *Comcast* – is also incorrect. Respondent Indirect Purchaser Class' expert demonstrated a common methodology for proving damages to the Class. Pet. App. 154a-55a. Under his methodology, there would be no individual damages issues presented at trial. Respondents demonstrated methodologies for

determining which Petitioner or co-conspirator produced each relevant foam product, many of which are branded by the Petitioners.[6] 23(f) App. A4458-4532, A6708; Pet. App. 152a-53a. Indeed, Petitioners and their co-defendants who did not join the Petition dominate the market for foam, and they manufacture and sell more than 90% of the foam at issue here. Pet. App. 19a-20a. Any argument regarding these expert methodologies turns on disputed issues of fact which Petitioners are certain to raise again at trial in the district court and the court of appeals.

Rule 23(b)(3) mandates that a district court should consider whether individual issues, including damages issues, will predominate over common issues when exercising its discretion to certify a class under Rule 23(b)(3). The circuits recognize that if individual damages issues may predominate at trial, class certification may be improper. But barring the absence of a class-wide methodology for proving damages, as discussed in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013), and *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 254-55 (D.C. Cir. 2013) the application of these legal

[6] Despite Petitioners' suggestion that any foam product is encompassed within the Class, the Indirect Purchaser class definition is limited to purchasers of discrete categories of high value products which are either wholly polyurethane foam or which contain considerable quantities of polyurethane foam: carpet cushion, bedding (such as mattresses), and upholstered furniture (such as sofas). Pet. App. 18a-19a. Respondent also demonstrated how the manufacturer of foam in these products would be identified. Pet. App. 152a-53a.

rules to the facts in any individual case, including this one, is generally fact-bound and disputed, and therefore inappropriate for this Court's review. Moreover, the use of aggregate damages calculations in class actions is well-established, and such methodologies have been accepted by this Court. *La Buy v. Howes Leather Company*, 352 U.S. 249, 259 (1957).[7]

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[7] Amicus Dow urges this Court to rewrite Rule 23 and significantly limit its availability by creating a presumption that a large case cannot be certified as a class action, and creating a black letter rule against class certification in antitrust cases when a defendant claims that prices were subject to negotiations. Dow implicitly would have this Court also overrule its long-standing precedent holding that once liability is established, a reasonable estimate of damages is sufficient. *Hetzel v. Baltimore & O.R. Co.*, 169 U.S. 26, 37 (1898) ("Absolute certainty as to the damages sustained is in many cases impossible. All that the law requires is that such damages be allowed as . . . directly and naturally resulted from the injury for which suit is brought."); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("While damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946) (Following *Hetzel* as "well settled principle" and finding a "jury could return a verdict for the plaintiffs" in the absence of "exact" damages); *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-66 (1981) (internal quotations omitted) ("The Court has repeatedly held that in the absence of more precise proof, the factfinder may conclude as a matter of just and reasonable inference from the proof of the defendants' wrongful acts . . . that defendants' wrongful acts had caused damage to the plaintiffs.").

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THE PETITION SHOULD BE DENIED

I. THE PETITION SEEKS REVIEW OF AN INTERLOCUTORY RULING

The Petition seeks review of an interlocutory opinion granting class certification. While Rule 23(f) allows a party to seek immediate review of an order granting class certification, it rests in the "unfettered discretion" of the appellate court whether to accept the appeal. *See* 1998 Advisory Committee Notes to Rule 23(f). Here, the Sixth Circuit exercised its "unfettered discretion" and denied leave to appeal at this time. The appellate court appropriately found that

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Dow's brief demonstrates that the instant petition should be denied since it is interlocutory and because Dow tried its case to jury verdict and was not forced to settle. While it complains, without citation to the record, that it could not challenge elements of the class certification decision at trial, it ignores the availability of *Daubert* motions, motions in limine, and summary judgment motions to challenge the rulings and the evidence which supported the class certification decision in its case. The claimed impediments to challenging class certification and damages at trial which it discusses are not legal barriers but instead reflect Dow's own decisions regarding trial strategy. Moreover, Dow ignores this Court's recent decisions which reinforce the need for a "rigorous analysis" of the evidence supporting class certification.

In this case the district court conducted a rigorous analysis of the evidence supporting class certification and determined that common issues predominated, thus mooting Dow's legal concerns as applied to the instant case. Petitioners here continue to raise claims of negotiated prices as a defense and the district court considered that presentation as part of its class certification decision.

there was no reason for interlocutory review because the district court's opinion was not clearly erroneous, and it noted that Petitioners would have further ample opportunity to address the class certification ruling and the evidence supporting it during further district court proceedings or through an appeal as of right filed at the conclusion of the case. Pet. App. 10a-11a. In essence, the Sixth Circuit found that there was nothing urgent about the issues raised by Petitioners. *See id.*

The Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Opinion of Justice Scalia). Additionally, Respondents are not aware of *any* case where this Court has granted a petition for writ of certiorari from a court of appeals exercising its "unfettered discretion" to deny a petition for leave to appeal under Rule 23(f). While Petitioners' claim that *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013), and *Dart Cherokee Basin Operating Co. v. Owens*, 134 S. Ct. 1788 (2014), demonstrate that this Court will hear cases where the court of appeals denied discretionary review, those cases are inapposite. Both involved removals of cases from state to federal court under the Class Action Fairness Act (CAFA). In both cases, the district court had granted a motion to remand the case to state court and thereby terminated jurisdiction in the federal courts. The only appeal allowed from the grant or denial of a motion to remand under CAFA is one that is discretionary. 28 U.S.C. §1453(c)(1).

In each of those cases, when the court of appeals denied leave to appeal, it was the end of the case in federal court – the decision was *final*.[8] Indeed, this Court's recent opinion in *Dart Cherokee Basin Operating Co. v. Owens,* No. 13-719, slip op. (Dec. 15, 2014) demonstrates precisely why granting certiorari would be inappropriate here. In that case, the majority noted with concern that the result of leaving the remand order unreviewed was that the entire case would "leave the ambit of the federal courts for good, precluding any other opportunity for [the defendant] to vindicate its claimed legal entitlement [under CAFA] . . . to have a federal tribunal adjudicate the merits." *Dart Cherokee*, No. 13-719, slip. op. at 2.[9] The

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[8] Petitioners should be particularly aware that *Standard Fire* is inapposite as their Counsel of Record here was also counsel of record for the petitioner in *Standard Fire*, and who wrote that the core issue presented in *Standard Fire* was that the remand order at issue "deprives Standard Fire of the federal forum that Congress intended to provide. . . ." *See* Brief for Petitioner, No. 11-1450, 2012 WL 5246242 at *29 (filed Oct. 22, 2012).

[9] In dissent, Justice Scalia not only disagreed with reviewing the remand order at issue, but also noted that while *Knowles* arose in the same posture as *Dart Cherokee*, the question of whether the circuit court there had abused its discretion in denying leave to appeal was not then before the Court. *Dart Cherokee,* No. 13-719, slip op. at 7. On this point, Justice Scalia noted that if the issue had been raised in *Standard Fire* he might not have joined the majority opinion there and, with it raised in *Dart Cherokee*, could not join the majority opinion. *See id.* (*quoting* Justice Jackson's dissent in *Massachusetts v. United States,* 333 U.S. 611, 639-40 (1948): "I see no reason why I

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majority was also concerned that the district court's incorrect interpretation of the removal statute would harden into established practice for Tenth Circuit practitioners and escape further appellate review. Slip op. at 10-12.

Here, in contrast, the Sixth Circuit merely deferred hearing an appeal until there was a final judgment. The decision remains interlocutory, and is subject to further review by the district court during this ongoing case and by the Sixth Circuit at the end of the case. *See, e.g.*, Pet. App. 10a-11a; Dist. Ct. Dkt. 1384 at 2. The results of those proceedings may make this Court's consideration of the district court's class certification ruling superfluous.

II. PETITIONERS' ARTICLE III STANDING ARGUMENT FAILS

This Court's decisions make clear that Article III standing consists of three elements:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest. . . . Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

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should be consciously wrong today because I was unconsciously wrong yesterday.").

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (citations and footnote omitted); *see Ass'n of Data Processing Service Org. v. Camp*, 397 U.S. 150, 152-53 (1970).

The ultimate resolution of disputed evidence regarding Article III standing is a merits question for the factfinder at trial. Moreover, standing is determined by examining the named plaintiffs, not the absent class members. *See Warth v. Seldin,* 422 U.S. 490, 502 (1975) ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class.").

The district court did not violate these principles and there is no circuit split as to their applicability.

It is clear that members of the Respondent Indirect Purchaser Class satisfy all three of the elements of Article III standing. The injury in fact requirement is satisfied because the Class definition is limited to those persons who purchased polyurethane foam products which were subject to the price-fixing conspiracy, and paid more than if the conspiracy did not exist. Second, there is a causal connection between Petitioners' maintenance of *supra*-competitive prices for foam, and Class members being injured by paying more for those products than they would have in the absence of the conspiracy. Finally, a favorable decision for the Class will redress the injuries they incurred by paying more for the products.

Article III requires no more at the class certification stage. Petitioners challenge the existence of the conspiracy, whether it raised prices, and whether the Indirect Purchaser Class members paid inflated prices. In contrast, Respondent Indirect Purchaser Class produced evidence supporting the existence of the conspiracy, that Petitioners and their co-defendants raised prices, and that the Class paid those inflated prices. Because it is improper to resolve the merits of the case at the class certification stage as this Court recognized in *Amgen*, Respondent was not required to prove, and the district court was not required to determine, the ultimate merits of each Class member's claim before deciding whether to certify the Class.

Moreover, application of these principles demonstrates that there is no circuit split concerning the interpretation of Article III standing in the cases cited by Petitioners. None of those cases holds that a class should be defined to include members who cannot allege the elements of Article III standing: injury in fact, causation, and redressability. Rather, some of them, such as the Seventh Circuit's decision in *Kohen v. Pacific Inv. Management Co. LLC,* 571 F.3d 672 (7th Cir. 2009), *cert. denied*, 559 U.S. 962 (2010), look ahead to the resolution of the case and whether the claims of some class members will ultimately fail on the merits, and how that could impact class certification.

Thus, in *Kohen*, all of the class members were subject to the commodities market manipulation which was the subject of the suit, and all of them

could allege injury in fact, as well as the remainder of the requirements for Article III standing. The defendants there argued that they would ultimately prove on the merits that many class members had more trades where they profited due to the manipulation than trades where they lost money due to the manipulation. The Seventh Circuit held that unless the defendants could show that a "great many" class members would ultimately not recover damages because they profited overall, a narrowly defined class was properly certified despite the possibility that some class members would be subject to defenses preventing recovery.

The Tenth Circuit's decision in *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1197-98 (10th Cir. 2010), similarly concerned a class which was drawn so that all class members were injured or at risk of future injury from the challenged policies of the defendant state agency against which injunctive relief was sought. *Id.* at 1196. *Stricklin* involved certification of a class challenging state policies under Rule 23(b)(2), not Rule 23(b)(3) as in the instant case.[10] The Tenth Circuit cited *Kohen* while rejecting the defendants'

[10] As the 1966 Advisory Committee Notes to Rule 23(b)(2) explain:

> This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate.

argument that plaintiffs were required to prove the merits of their claims as to all class members before the class could be certified:

> Requiring Named Plaintiffs to prove all class members were [injured] at the certification stage would require them to *answer* the common question of fact or law, rather than just prove it exists.

Id. at 1198. The Tenth Circuit found that Rule 23(b)(2) was designed to allow certification of a class of individuals seeking injunctive relief to challenge policies to which they were subject even if not all of them experienced present or imminent harm. *Id.* (citing 1966 Advisory Committee Notes to Rule 23(b)(2), which are quoted in relevant part in footnote 10 *supra*).

In contrast, the cases that Petitioners claim are on the other side of the conjured circuit split agree that class members should be able to demonstrate injury in fact and the other elements of Article III standing for a class to be certified, but none of them holds that determining individual future success at trial of class members is a precondition for class certification, or that the possibility that some class members may not recover damages at trial precludes class certification. To the extent these opinions say that each class member must be "injured" at class certification, they refer to defining the class to exclude persons who clearly lack injury in fact, not that ultimate recoverable injury be proven for each class member at class certification, thus obviating the need for trial.

Indeed, *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), the keystone of the Petitioners' claimed circuit split, certified a class where some class members could not allege present damages. *Denney* described the Article III standing issue as requiring that "a plaintiff must have suffered an 'injury in fact.'" *Id*. at 263 (citations omitted). As *Denney* continued,

> an injury-in-fact differs from a "legal interest"; an injury-in-fact need not be capable of sustaining a valid cause of action under applicable tort law. An injury-in-fact may simply be the fear or anxiety of future harm. For example, exposure to toxic or harmful substances has been held sufficient to satisfy the Article III injury-in-fact requirement even without physical symptoms of injury caused by the exposure, and even though exposure alone may not provide sufficient ground for a claim under state tort law. *See Whitmore* [*v. Arkansas*], 495 U.S. [149,] at 155, 110 S.Ct. 1717 [(1990)] ("Our threshold inquiry into standing 'in no way depends on the merits of the [plaintiff's claim.]'") (quoting *Warth*, 422 U.S. at 500, 95 S.Ct. 2197).

Denney, 443 F.3d at 264-65. Thus, *Denney* recognized that a class drawn to include all those persons who had been exposed to a harm was proper even if it had members who lacked a legally compensable interest. Moreover, *Denney* specifically stated that evidence of individual standing of each and every class member was not a prerequisite to class certification:

> We do not require that each member of a class submit evidence of personal standing. At the same time, no class may be certified that contains members lacking Article III standing. The class *must therefore be defined* in such a way that anyone within it would have standing.

Id. at 263-64 (internal citations omitted) (emphasis added). Instead, *Denney* acknowledged that a properly drawn class definition is the proper method to ensure that the class does not contain members that could not have suffered an injury in fact.

The issues faced by the Eighth Circuit in *Halvorson* and the Ninth Circuit in *Mazza* were class definitions drawn so as to include objectively identifiable groups of individuals who could not have alleged injury in fact. *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773 (8th Cir. 2013); *Mazza v. American Honda Motor Co., Inc.,* 666 F.3d 581 (9th Cir. 2012). *Halvorson* involved whether auto insurers had paid "reasonable" charges for medical procedures, but the class definition included anyone who received payment for less than the full amount of the bills they submitted, whether or not those charges were "reasonable." *Halvorson*, 718 F.3d at 777. *Mazza* involved false advertising regarding the performance of a car system, advertising that the Ninth Circuit noted was very limited, but the class was defined to include persons who were not exposed to the advertising, and persons who learned that the system did not perform as advertised, neither of which could be injured. *Mazza*,

666 F.3d at 594, 596. Although the Ninth Circuit found the class definition improper because it assumed reliance on the advertising, the Ninth Circuit relied on *Denney* and found that allegations that "class members were relieved of their money by Honda's deceptive conduct" by themselves established Article III standing, and it rejected Honda's argument that plaintiffs were further required to provide particularized proof of injury and causation. *Id.* at 595.[11]

Finally, Petitioners erroneously argue that *Krell v. Prudential Insurance Co. of America*, 148 F.3d 283 (3d Cir. 1998), conflicts with the Second Circuit in *Denney*, as well as with the Eighth and Ninth Circuits, because *Krell* stated that standing should be

[11] Petitioners' selective quotation of *Mazza* raises the more significant issue as to whether the opinion is even appropriately cited for stating the operative standard in the Ninth Circuit. The Ninth Circuit had previously held that standing is satisfied in a class action if "at least one named plaintiff meets the requirements." *Bates v. UPS*, 511 F.3d 974, 985 (9th Cir. 2007) (*en banc*). Because a three-judge panel in the Ninth Circuit cannot overrule the decision of a prior *en banc* panel unless "the reasoning or theory of prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority," *Pinto v. Holder*, 648 F.3d 976, 982 (9th Cir. 2011), the binding Ninth Circuit precedent is directly aligned with the district court here. *See, e.g., Arnott v. U.S. Citizenship & Immig. Serv.*, 290 F.R.D. 579, 584 (C.D. Cal. 2012) (noting that other district courts had refused to apply *Mazza* in the fashion sought by Petitioners and that the statement regarding standing was a "single line in *Mazza*, unexplained and absent any discussion of prior Ninth Circuit precedent, directly contradicts *Bates*, which was rendered *en banc*.").

judged by looking at the named plaintiffs, not the absent class members. *Krell*, 148 F.3d at 306-07. Because *Denney* said the same thing, *Denney*, 443 F.3d at 263-64 (*see supra* at 16-17), there is no conflict.

Nonetheless, Petitioners urge that there must be a split between the circuits because the Fifth Circuit said so in *Deepwater Horizon*. *In re Deepwater Horizon*, 739 F.3d 790, 798-802 (5th Cir. 2014), *cert. denied* (Dec. 8, 2014). While *Deepwater Horizon* discussed a perceived split between the formulation used in *Kohen* and the one used in *Denney*, the analysis in the decision actually demonstrates the harmony between the circuits.

The Fifth Circuit's decision in *Deepwater Horizon* demonstrates that the class in that case met both the *Kohen* and *Denney* formulations. *Deepwater Horizon*, 739 F.3d at 802-04. According to the Fifth Circuit, *Denney* determined Article III standing at the class certification stage for class members using a pleading standard of whether the class member could allege injury. *Id.* at 802-03. It further noted that *Denney* stated that only the named plaintiffs needed to demonstrate Article III standing at the class certification stage. *Id.* at 801.

However, after finding that the class before it fully comported with the Second Circuit's opinion in *Denney*, the Fifth Circuit noted that the class might include persons who were not injured, but that this was not error:

> [W]e note the possibility that the application of a stricter evidentiary standard might reveal persons or entities who have received payments under Exhibits 4B and 4C and yet have suffered no loss resulting from the oil spill. But courts are not authorized to apply such a standard for this purpose at the Rule 23 stage.
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> * * *
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> BP has cited no authority – and we are aware of none – that would permit an evidentiary inquiry into the Article III standing of absent class members during class certification and settlement approval under Rule 23. It is true that a district court may "probe behind the pleadings" when examining whether a specific case meets the requirements of Rule 23, such as numerosity, commonality, typicality, and adequacy. But the Supreme Court cautioned in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds,* ___ U.S. ___, 133 S.Ct. 1184, 1194-95, 185 L.Ed.2d 308 (2013), that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."

739 F.3d at 805-06 (footnotes omitted).

Thus, examining the Fifth Circuit's decision in *Deepwater Horizon*, and putting the quoted language

from the cases in context, once one parses beyond the sound-bite quotes argued, Petitioners' supposed circuit split evaporates.

Here all Indirect Purchaser Class members were subjected to illegally inflated foam prices caused by the Petitioners' conspiracy. Respondent's expert, Dr. Lamb, established that the illegal overcharges were passed on to the Indirect Purchaser Class.[12] Pet. App. 127a. This is more than sufficient to establish that the class members adequately demonstrated Article III standing at the class certification stage. *Warth*, 422 U.S. at 502; *Lujan*, 504 U.S. at 560-61. Whether, through some serendipitous combination of circumstances, some consumer might have avoided paying the overcharge, is a merits issue beyond proper consideration at the class certification stage. Requiring proof of injury, and especially individual proof of

[12] Petitioners are wrong when they argue that increased foam prices were not passed on to the Indirect Purchaser Class. Dr. Lamb established that they were, through both economic theory and regression analysis using actual data produced in the case. Pet. App. 137a-38a, 132a-33a. To the extent that some witnesses with minimal knowledge speculated that increased prices were not passed on to consumers, other evidence was adduced from more reliable sources indicating that they were. Pet. App. 148a-49a. Moreover, Petitioners' persistently mischaracterize Dr. Lamb and Dr. Leitzinger's article as questioning the law of one price – the article was on another topic, they did not question it there, but they noted an article which had questioned it in a footnote. 23(f) App. A5363. At most, this disagreement demonstrates additional issues of fact making it improvident to grant the petition.

injury, at class certification has been consistently rejected by this Court. *Amgen*, 133 S. Ct. at 1194-95.

In the final analysis, Petitioners' claim that the Respondent Indirect Purchaser Class includes many uninjured members presents a factual issue going to the merits. The issue before the district court at the class certification stage is not whether Plaintiffs have proven injury, but whether Plaintiffs have a methodology for doing so. *Amgen*, 133 S. Ct. at 1196. This Court should not grant certiorari to review this issue.

III. PETITIONERS' INDIVIDUAL DAMAGES ARGUMENT FAILS

Petitioners' individual damages argument is inapposite because the district court did not find that individual damages would overwhelm the proceedings. Rather, the district court found that Respondent Indirect Purchaser Class had a common methodology for determining class-wide damages. For Petitioners' argument to have any relevance, this Court would first have to determine that Respondent's class-wide damages methodology was wrong, and then have to determine that in its absence, damages would have to be calculated on an individual basis. Reaching these fact-bound questions is inappropriate for this Court.

The district court below, like the circuits, properly applied this Court's decision in *Comcast*, 133 S. Ct. 1426, which held that a "model purporting to serve as evidence of damages . . . must measure only those damages attributable to th[e] theory" of liability on

which the class action is premised. *Id.* at 1433. "If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* "[A] methodology that identifies damages *that are not the result of the wrong*" is an impermissible basis for calculating class-wide damages. *Id.* at 1434 (emphasis added). Thus, this Court in *Comcast* recognized that a proposed damages model needs to measure class-wide damages arising from the wrongful conduct at issue. Dr. Lamb's damages model properly estimates overcharges across time rather than tying overcharges to particular price increase announcements, thus matching Respondent Indirect Purchasers' liability theory that the conspiracy caused *supra*-competitive pricing throughout the class period in accordance with *Comcast. See also Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 563 (1931); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946) (plaintiff need only demonstrate a reasonable estimate of damages because the defendant's actions prevented a more precise measure).

1. *Comcast* recognized that individual damages issues can preclude class certification *if* they predominate. But the issue is not whether there are *any* individual damages issues, as Petitioners urge, but rather whether individual damages issues *predominate*. In *Comcast*, once the plaintiffs' damages methodology was rejected because it did not fit the theory of liability, and there was no common method for

proving damages, the finding of predominance needed to be re-examined by the lower courts. *Comcast* did not create a black-letter rule barring class certification where there are individual damages issues.

The same was true in the D.C. Circuit's opinion in *Rail Freight*: where the plaintiffs' expert's opinion, which was crucial to demonstrating injury and damages for class certification, was asserted by the Defendant to have found injury where none could be found, thereby generating "false positives." *Rail Freight*, 725 F.3d at 253. The Court noted that the District Court class certification decision, which had been decided before *Comcast*, had not expressly addressed the "false positives" argument, which *Comcast* required to be addressed, and so the case was remanded. *Id.* at 253-55. The D.C. Circuit did not say that the class could not be certified, or that certification was improper if individual damages issues were present. *Id.* at 255.

And, as the Tenth Circuit recognized in *Roderick*, the correct inquiry is not whether there are any individual damages issues, but whether they will "overwhelm those questions common to the class." *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013).

The cited opinions from the Sixth, Seventh, and Fifth Circuits do not dispute this rule. The issue is simply one of degree: whether individual issues overwhelm common issues. Thus, the Sixth Circuit mirrored *Roderick* when it stated in *Whirlpool* that "a

class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members." *In re Whirlpool Corp. Front-Loading Washer Products Liability Litig.*, 722 F.3d 838, 861 (6th Cir. 2013) (citation and quotation marks omitted). Similarly, the Seventh Circuit recognized in its initial opinion in *Butler*, which involved the same product defect as the Sixth Circuit *Whirlpool* case:

> "Rule 23(b)(3) conditions the maintenance of a class action on a finding by the district court 'that the questions of fact or law common to class members predominate over any questions affecting only individual members.'"

Butler v. Sears, Roebuck and Co., 702 F.3d 359, 361 (7th Cir. 2012), *vacated and remanded*, 133 S. Ct. 2768 (2013). In *Deepwater Horizon*, which involved a class action settlement, the Fifth Circuit stated that "predominance was based not on common issues of damages but on the numerous common issues of liability." *Deepwater Horizon*, 739 F.3d at 815.

The Ninth Circuit opinions cited by Petitioners, which state that class certification should not be denied by the presence of individual damages issues alone, are consistent with decisions from the other circuits. Thus, in *Leyva v. Medline Industries Inc.*, 716 F.3d 510, 514 (9th Cir. 2013), a wage and hour case, the Ninth Circuit found that the defendant's computerized time keeping system could be used to easily generate damages computations if plaintiffs

prevailed. The court noted that some individualized damages calculations were inherent in any wage and hour case. Indeed, while wage and hour cases are likely to always involve individual calculations of damages, those calculations will be formulaic applications of class-wide findings.[13] Likewise, *Jimenez v. Allstate Ins. Co.,* 765 F.3d 1161 (9th Cir. 2014) was a wage and hour case. While *Jimenez* states that individual damages questions do not defeat class certification in the Ninth Circuit, once that statement is put in the context of the limited class that was certified in *Jimenez*, which would only determine the class-wide issues of Allstate's liability, with individual damages calculations left for other proceedings, the supposed conflict fades away. In this way, *Jimenez* mirrors *Roderick*, which Petitioners believe correctly interprets *Comcast*: "there are ways to preserve the class action model in the face of individualized damages." *Wallace B. Roderick Revocable Living Trust v. XTO Energy*, 725 F.3d 1213, 1220 (10th Cir. 2013).

2. Nor is there a circuit split regarding the propriety of aggregate damages models. This Court has previously recognized that aggregate damages

[13] Indeed, the Northern District of California has noted that whether individual damages issues would predominate clearly did impact the Ninth Circuit's calculus, because the Ninth Circuit took care to determine the ease of the individual damages calculations in *Leyva* before determining that it should be certified as a class action for both liability and damages. *Lilly v. Jamba Juice Co.*, Case No. 13-cv-02998-JST, 2014 WL 4652283, *10 (N.D. Cal. Sept. 18, 2014).

methodologies may be used. Petitioners have failed to cite a single case from a single circuit that states that under no circumstances may a class prove damages through a class-wide damages model.

The Second Circuit, in *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), did not reject the use of aggregate damages in class actions. Instead, it merely rejected a particular model because the model, if utilized, would result in inflated damages inconsistent with defendant's actual liability. In *Hickory Securities Ltd. v. Republic of Argentina*, 493 Fed. Appx. 156, 159 (2d Cir. 2012), the Second Circuit cited *McLaughlin* for the proposition that aggregate damages models are entirely permissible, provided they remain consistent with defendant's actual liability. Similarly, the Ninth Circuit in *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974), did not reject aggregate damages, but rather rejected a proposed methodology which did not purport to allocate damages based upon injury.

Petitioners' reliance upon *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342-44 (4th Cir. 1998), to argue that the Fourth Circuit rejects the use of aggregate damages models is misplaced. *Broussard* did not involve aggregate damages. In *Broussard*, the need to determine each class member's lost profits individually to meet a *higher* standard under North Carolina state law than will apply here was only one of a number of individual issues which collectively made class certification inappropriate. *Id.*; *compare In re Scrap Metal Antitrust Litig.*,

527 F.3d 517, 533 (6th Cir. 2008) ("Once liability is established, therefore, a plaintiff's proof of damages is evaluated under a more lenient standard.").

Petitioners ignore this Court's decision in *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259 (1957). There, this Court recognized that it is entirely permissible to conduct a detailed accounting of individual damages by a special master *after* liability is determined and an aggregate damages award is entered. *Id.* Other circuits have similarly recognized that a class may prove aggregate damages through a class-wide damages model. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197-98 (1st Cir. 2009) ("The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself."); *Scrap Metal*, 527 F.3d at 534; *Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir. 1996) (noting that a defendant's interest is "only in the total amount of damages for which it will be liable," not "the identities of those receiving damage awards.").

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

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Respectfully submitted,

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